

DECISION  
TALBOT COUNTY BOARD OF APPEALS  
Appeal No. 10-1548

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals at the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland, beginning at 7:30 p.m., November 22, 2010 on the Application of **ROBERT AND GAIL WILENSKY** (Applicant). The Applicant is seeking three variances of the 100' Shoreline Development Buffer to (1) convert an existing attic to second floor living space through vertical expansion of the existing one story garage to be located 51'-7" from Mean High Water (MHW) by raising the roofline of the garage to 26'-10", including placement of new HVAC equipment to be located 55'-2" from MHW; (2) expand the first floor footprint by 59 sq. ft. and construct a second floor over the expansion to be located 56'-9" from MHW; and (3) cantilever new second floor space 18" beyond the existing floor footprint to be located 60'-3" from MHW. The closest point of the existing residence is 46'-9" from MHW. The applicant's request is made to allow for the renovation of an existing residence located largely within the Shoreline Development Buffer. The request is made in accordance with Chapter 190, Zoning, Article VI, §190-139, Article VIII, §190-169 and Article IX, §190-182 of the Talbot County Code (Code). The property is located at 25190 Irish Creek Court, Royal Oak, Maryland 21662 in the Rural Residential Area (RR) Zone. The property owners are Robert and Gail Wilensky and the property is shown on Tax Map 46 Grid 10 Parcel 66.

Present at the hearing were Board of Appeals members Paul Shortall, Jr., Chairman; Phillip Jones, Vice Chairman; Rush Moody; Betty Crothers; and John Sewell. Anne C. Ogletree was the attorney for the Board of Appeals.

It was noted for the record that all members of the Board had visited the site.

The following exhibits were offered and admitted into evidence as Board's Exhibits as indicated:

1. Application for Critical Area Variance and Attachment A.
2. Copy of tax map of subject property, highlighted in pink
3. Notice of Public Hearing
4. Newspaper Confirmation
5. Notice of Hearing & Adjacent Property Owners List attached (2 pages)

6. Variance Standards for Critical Area with Attachment B
7. Staff Report, prepared by Brett Ewing, on October 25, 2010.
8. Sign Maintenance Agreement
9. Site Plan prepared by East Bay Construction Service, LLC, labeled p. 1
10. Elevation Plan, prepared by East Bay Construction Service, labeled p. 2 and 3  
(Exhibit 10 includes Floor Plans)
12. Critical Area Letter from Nick Kelly dated November 15, 2010.
13. Letter of Authorization from Applicants dated October 7, 2010.
14. Letter from Sandy Coyman, Planning Officer, dated November 22, 2010.
15. Independent Procedures Disclosure and Acknowledgment Form.
16. Aerial photo dated October 12, 2010.

All potential witnesses were sworn. Ryan Showalter, Esq. directed the testimony of the Applicant. He introduced himself, Robert Wilensky, one of the owners, and Lars Erickson of East Bay Construction Services, LLC, who designed the proposed construction.

The Chairman asked Mr. Showalter to give an overall view of the property and the nature of the request before addressing the specific requirements of the variances and specific questions Board members might have about the project.

Mr. Showalter provided the property address and tax map designation adding that the property was just under three point six six (3.66) acres in size and was zoned Rural Residential. He noted that the record for the hearing contained both a County staff report as well as a Critical Area Commission comment letter. He informed the Board the Applicant was requesting three variances for related projects.

The first request was highlighted on the site plan (Exhibit 9) in purple (or magenta). It is a variance for the vertical expansion of an existing garage. There is no new footprint associated with that variance. The proposed construction will be no closer to MHW than the existing structure (51'-7"). The vertical expansion to the peak of the roof will raise the roof to just over twenty six (26) feet, in keeping with the height of the existing house. The variance includes a small forty (40) inch square concrete pad on which an additional HVAC unit will be located.

The second variance is shaded in blue on Exhibit 9, the site plan. It will expand the first floor footprint by fifty nine (59) sq. ft. and also includes vertical construction over the new

footprint. The proposed construction would be located fifty-six point nine feet (56'-9") from MHW, no closer than the closest point of the existing structure.

The third variance is shaded in green on the site plan. The proposed variance is to cantilever new second floor space eighteen inches (18") beyond the existing first floor footprint. Because of the definitions in the Critical Area law, this cantilevered space, being second floor space and extending not more than twenty-four inches (24") is not considered as new lot coverage, but it is new development within the buffer and it is therefore shown on the site plan as a separate variance enclosing a total of thirty-three (33) square feet of additional disturbance within the buffer, even though the development will not be situated on the ground.

In conjunction with the proposed variances are two (2) proposed modifications to the existing structure which are material to the variance requests. The first involves a significant area of deck around the pool and between the house and the water. The decking was constructed prior to the advent of the Critical Area law, before the definition of lot coverage or impervious surface defined the spacing required between deck boards. One of the modifications proposed would be placing quarter inch (1/4") gaps between all the boards of the decking, resulting in a lot coverage decrease of almost twenty-eight hundred (2,800) square feet.

The second modification proposed is in the area just waterward of the proposed construction where there are five (5) HVAC units that serve the existing house. Currently all are located on a large continuous concrete pad. The Applicant proposes removing the large pad and replacing it with smaller pads sized for the five (5) units. That modification has been determined by the Planning Director to be a replacement in kind and does not require approval of the Board, but will result in a net decrease in both lot coverage and actual structural footprint of one hundred seventy (170) square feet. If approved, the result of the three (3) variances and planned modifications is an overall reduction in structural lot coverage of sixty-six (66) square feet, and reduction of total lot coverage of approximately twenty-eight hundred (2,800) square feet.

Mr. Robert Wilensky advised the Board that he purchased the property in 1993, and that the house was existing at that time. It was built in 1985. He explained to the Board that the house was used to accommodate his family. He described a large extended family making frequent visits. He initially contacted Mr. Erickson for two reasons: (1) the sleeping accommodations for grandchildren would soon be insufficient; (2) the oldest grandchild is a pre-teen, and will soon be

in high school, and there is no place where she can go to 'have her own space'. If there is a separate area where the older grandchildren could go to be away from both adults and younger children it would be more attractive for those youngsters to spend time with the Applicant. The area would serve as open space where the teens could entertain themselves or friends who came to visit.

Mr. Wilensky stated that although the house had many cubic feet, the usable square footage was rather small. There is one usable living area, and although there are bedrooms on the second floor, sending teens to bedrooms to get away from adults did not seem like a good idea.

Mr. Lars Erickson was asked to explain how he arrived at the current proposal, and what he considered before recommending the current proposal.

Mr. Erickson said that his first consideration was a place where he could create the space the Applicant needed that is not within the Buffer. After almost a year dealing with the Health Department, it became clear that the space had to be attached to the house. If it is separate from the house it is considered to be a separate dwelling unit and will require a minimum of two (2) acres, and therefore a four acre minimum lot size. The only place to attach a structure to the existing residence without going up is right off the kitchen and over the existing septic system.

The next consideration was to determine a placement which would create the least possible impact. That suggested that it be on top of the existing garage. The garage footprint is already there and the construction would be vertical. The footprint does grow by fifty-nine (59) sq. feet as a direct result of having to put a stairway in the garage to access the new space.

The Applicant and Mr. Erickson spent a lot of time exploring how to keep the improvements within the footprint. Since the County regulations allow a twenty-four (24) inch roof overhang without counting towards lot coverage, cantilevering the second floor eighteen (18) inches and providing a six (6) inch overhang would keep the project unobjectionable.

Mr. Erickson felt that he and the Applicant had done everything they could do to shrink the project and keep it as small as possible, but he noted that he was constrained by the footprint he had to work within. He pointed out that placing the structure anywhere else on the lot (provided Health Department approval was obtained) would result in more lot coverage and a greater impact, including the cutting of trees. The proposed construction gave the Applicant the separation desired with the least impact on the site.

Mr. Erickson commented that the existing house floor plan is such that on the first floor there are big open rooms that are all open to each other. The second floor has modest sized bedrooms that currently exist, but downstairs there is no place from which the designer could take space to put a proposed room. He suggested that to try to re-divide the existing family living space would not improve the functionality of the house. Other than putting the new space on top of the garage, there was no other suitable location on site.

Mr. Showalter asked Mr. Erickson to clarify Mr. Wilensky's comment about there being a lot of cubic footage, but not enough square footage. Mr. Erickson explained that the central court was open from floor to roof. The size of the central court of the home made it impossible to clearspan the open area. All of the rooms on the right were accessible from the central court, and the master bedroom suite occupied the area to the left of the central court.

Mr. Erickson addressed the access to the proposed addition. He stated that although the garage and house are attached to each other, one cannot enter the garage from the house, as the garage is attached to the rear of the master bathroom. It was necessary to create a separate entrance, and to do so, a significant amount of space in the garage had to be used to provide fire separation. It was necessary to create a bathroom, as there is no access to the house from the garage. Mr. Erickson explained that the cantilevered space was to make the new room feel like its own guest suite, rather than a box on a garage. He advised the Board that no clearing would be required on the site, no habitat areas would be disturbed.

Mr. Erickson was asked to opine whether a project in any other location on the property might affect habitat. He responded that the lot was fully wooded, so any other location would require clearing and would result in a structure being built closer to MHW.

Mr. Showalter asked the members if they had questions on the extent of the project. Hearing none, he referred the Board to the Applicant's written responses to the variance criteria and asked Mr. Erickson to address specific criteria.

Mr. Erickson addressed the requirement that the variance not exceed the minimum adjustment necessary to relieve the unwarranted hardship. Mr. Erickson responded that given the space required for the family room, and the space in which he was required to put the addition, he had done his best not to increase the footprint. The addition was modest, there would be no addition to the existing height of the roof – it would be in keeping with that on the main house.

Mr. Showalter asked if it would be accurate to say that the impacts to the buffer were minimized. Mr. Erickson agreed they had been. He reminded the Board that the proposed addition would not require cutting trees, or going outside the existing footprint, which a detached structure would require. The modifications proposed would actually result in a reduction of lot coverage in the buffer due to the renovation of the decking to provide non-lot coverage decking and the removal of the large concrete HVAC pad.

Mr. Moody inquired about the location of the buffer lines if one used the lot to the south. Mr. Showalter asked Mr. Wilensky to describe the shoreline south of the pier. Mr. Wilensky replied that it was generally a straight line, so that the buffer line would extend generally due south.

Mr. Moody noted that Mr. Showalter had begun by saying most of the house was within the buffer, however the south end of the house did not appear to be within the buffer. Mr. Showalter agreed.

Mr. Moody stated that there was room to expand to the south without being in the buffer. Mr. Showalter acknowledged that if the lot line was changed by a lot line revision and there was a side yard variance one could extend to the south without being in the buffer.

Mr. Moody inquired if the lot to the south was also owned by the Applicants. If a lot line revision were approved, there would not need to be construction in the buffer. Mr. Showalter responded that Health Department approval would be required, and the Applicant had not explored that route. He also advised that the Applicant owned three lots, but they were non-conforming, and the Applicant would not be permitted to increase the nonconformity by making one smaller. He noted that even if the revision were permitted and/or the variance granted, it would also result in new lot coverage immediately adjacent to the buffer. He suggested that the Critical Area laws were intended to minimize impact on habitat, and if one looked at the site, construction on the south would require clearing existing forest to replace the parking area. Permitting clearing within one hundred twenty (120) feet of MHW and clearing forest to replace existing impervious surface did not seem to be consistent with the purpose of the law.

Mr. Moody inquired if building on the south required relocation of existing impervious surface.

Mr. Showalter responded that it would depend. There was a walkway in that area, to

create a space the size of that proposed would require covering existing lawn area, However, it would be outside the buffer.

Mr. Moody commented that he was not as much concerned about the requirement that the variance be only the minimum necessary to afford relief as that he did not understand the basic hardship. He understood that the Applicant desired to expand the home, but the Applicant purchased the property knowing they would have to comply with zoning regulations. He wasn't sure that denying the request to expand produced a hardship where there was still a substantial ability to use the property.

Mr. Showalter responded that the definition of hardship was the loss of both reasonable and significant use of the property. He felt that the testimony had addressed both of those components. He added that while the house encompasses a large volume of space, if one goes inside, it is constrained in terms of its functional usable area. He asked Mr. Erickson to explain to the Board how much of the first floor had living space above it.

Mr. Moody responded that if the variance was denied the house would still have substantial value and would be located on a beautiful piece of property and would still be usable as a residence.

Mr. Showalter suggested that the real question before the Board should be stated as "Does the location of this house within the buffer, given constraints caused by the inward curvature of the corners of the shoreline and the side setbacks required by zoning, unreasonably limit the Applicant's ability to expand or modify the house – a restriction that isn't imposed upon others similarly situated." He suggested that if the house were constructed outside the hundred (100) foot setback the Applicant would have had the right to do whatever it wished.

Mr. Jones commented that the first warrant was the hardship warrant -- that without a variance the Applicant would be denied reasonable use of the entire property. He felt that the staff at Critical Areas had not provided consistent guidance in that area. He noted that the comment from Critical Areas in this case did not provide much assistance, as they seem to be saying to the Board that they would accept the Board's decision provided the Board could find an appropriate reason to approve the request. For this reason Mr. Jones wanted to hear a good answer on the issue of hardship.

Mr. Wilensky added without the additional space it would be increasingly difficult for the

entire family to gather at one time, which was his desire. With the present configuration it would be difficult to achieve that end.

Mr. Showalter responded that when one looks at the first warrant, there are two elements or subparts to be addressed. The first is (1) the Applicant must demonstrate that there are special conditions or circumstances related to either the land and/or the structure. This case presents a very narrow property, elongated and almost entirely forested. It is configured so that the shoreline bends back to the west creating a small point. The house was constructed prior to the adoption of the Critical Area Law, in compliance with all the Talbot County setbacks at the time, and largely within what has now been designated as the buffer. So the unique configuration of the lot itself, and the location of the structure on the lot causes the hardship.

The house is configured so that there may be one or two feet on the south end before one intrudes on the side yard setback. It is constrained on both the north and the south by the side yard setback as well as the hundred (100) foot buffer. In this case there are circumstances unique to the structure. Above and beyond its footprint, its physical location on the lot, there are challenges with the interior. The structural walls, the open spans, and the open spaces within it were designed for entertaining crowds of people who didn't live in the home. These characteristics make it a very difficult structure to modify internally.

The second element of the warrant is that literal enforcement would result in unwarranted hardship. That is when one must consider the denial of reasonable and significant use, looking to the nature of the structure, the size and significance of the house, its location in the county, the nature of comparable structures in this area, the use of the Applicant's house is much more constrained than would be the use of a house outside the buffer.

Mr. Showalter believed that reasonableness and significance must consider the nature of the structure and the nature of the land. He noted that a recent Court of Special Appeals case held that reasonableness and significance did not require the smallest possible deviation, but required the consideration of the nature of the community and similar uses.

Mr. Jones commented that in their letter the Critical Areas staff asked about stormwater management. He noted he observed drains going under the existing decking and inquired as to where they go.

Mr. Erickson responded that they have to go five feet from the foundation, and then go to



the ground and the run off water percolates down.

Mr. Jones commented that although there is significant steep roof area, and a large volume of water which would be carried by the downspouts, he did not observe any erosion or signs of erosion. There was no growth of phragmites, which is generally a sign of erosion.

Mr. Shortall inquired if there were questions on any other of the variance criteria.

Mr. Sewell asked if one went into the fifty (50) foot side yard setback on the south, would there be additional constraints imposed on the adjoining lot. Mr. Showalter responded that he believed the adjoining lots were in the RCA Critical Area District, and that a lot line revision would not be permitted if the adjoining lot became smaller, as it would increase nonconformity. He felt it was unreasonable to expect an owner to abandon a buildable lot just to expand.

Mr. Sewell asked if the line could be moved to prevent encroaching into the fifty (50) foot setback. Mr. Showalter responded that a lot line revision might be permitted if there was still a buildable area and a suitable sewage reserve area on the second lot.

Mr. Shortall asked if the other members had any additional questions. Hearing none he commented that he could see that it was a very large house with a lot of open space within it, and that it would be hard to do anything within the existing part without more construction. He felt the Board's main concern was whether the Applicant had met the hardship criteria.

Mr. Showalter urged the Board to recognize that the Critical Areas Commission had not taken a strong position on the proposal, as it had in other cases. He felt that while the comment letter did not precisely support the variance, one could construe it did not object by reading the second page carefully and noting it would not support future variances, a condition to which the Applicant would agree.

Mr. Jones was not inclined to include the condition. Other members agreed.

Mr. Shortall suggested that the Board needed to decide. He suggested that there are constraints on the lot itself, and the Board needed to decide if there was anything he could do to the structure to meet his needs. There is very little one could do with the first floor to create the space. The question is does the lack of ability to create the space create a hardship.

Mr. Jones commented that the house has been adequate for at least ten (10) years, but now it's a different story because it's evident that an owner's needs can change, as the Applicant's have. If that is the case, then one must deal with the structure one has, and in this

case, the structure does not allow for that need. Given the need, what the Applicant proposes is not invasive of the terrain, it is quite reasonable. The case presents an interesting conundrum.

Mr. Sewell commented that he agreed that the hardship had to be peculiar to the land or the structure, and that the structure was very much the issue in this appeal.

Mr. Jones' first impression was "How much space do you need?", but this is a unique structure. One would have to rebuild to do something with it to add a guest suite, which is a normal addition in this area. He noted that it might be possible to come out the front of the house, but it would result in more lot coverage, and the fact that there is no more lot coverage would meet the Critical Area criteria.

Mr. Shortall commented that with this structure there is not a lot one can do without an major inside renovation.

Ms. Crothers commented she believed the project was reasonable in scope as it was intended for immediate family, and that it was being done the best way it could, given the structure.

There being no further discussion, the Chairman called for a motion.

Ms. Crothers moved that the application be approved as all of the variance requirements were met by a preponderance of the evidence for the following reasons:

- (1) Special conditions exist that are peculiar to the structure involved in that it is existing and is uniquely configured so that renovation other than that proposed by the Applicant would be impossible without adding to lot coverage;
- (2) A literal enforcement of the provisions of the ordinance would prohibit any renovation to the existing structure, as renovation would be within the Critical Area Buffer or require creating a non-conforming lot, preventing the applicants from enjoying the same rights as given to other county citizens;
- (3) The granting of the variance will not confer any special right or privilege on the property owner ; on the contrary, it will permit the owners to renovate, an activity which is permitted in the district;
- (4) The variance request is not based on conditions caused by the Applicant. The house was purchased by the Applicant in its current condition in 1993, and

- all conditions requiring the variances were present at that time;
- (5) The granting of the variances will not affect water quality or adversely impact wildlife, fish or plant habitat, and the applicant will create a buffer management plan and comply with the county storm water ordinance;
  - (6) The variances do not exceed the minimum necessary to alleviate the hardship, and the proposed renovations, in conjunction with the variances are actually reducing the lot coverage, thereby reducing overall non-conformity; and
  - (7) The Applicant is unable to use additional land to abate or reduce the non-conformity without impacting the ability to use the additional lot..

Mr. Sewell seconded the motion.

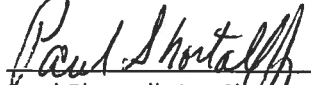
There being no further discussion, Mr. Shortall called for a vote. Ms. Crothers, Mr. Jones, Mr. Sewell and Mr. Shortall voted in favor of the motion. The motion carried..

HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS, BY THE TALBOT COUNTY BOARD OF APPEALS,

RESOLVED, that the Applicant, ROBERT AND GAIL WILENSKY (Appeal No. 10-1548) are **GRANTED** the three requested variances consistent with the evidence presented to the Board of Appeals, subject to the aforementioned conditions, by vote as previously noted.

GIVEN OVER OUR HANDS, this 2nd day of February, 2011.

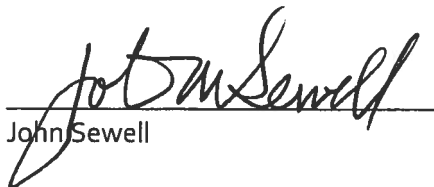
**TALBOT COUNTY BOARD OF APPEALS**

  
Paul Shortall, Jr., Chairman

  
Phillip Jones, Vice Chairman

Unavailable for Signature  
Rush Moody

  
Betty Crothers

  
John Sewell

